CITIBANK BHD

v.

ND CHANDRASEGARAN NEE & ORS

HIGH COURT MALAYA, KUALA LUMPUR
RK NATHAN J
[APPEAL NO: S2-21-14-1997]
16 OCTOBER 1998

CIVIL PROCEDURE: *Striking out - Application by 4th defendant to strike out claim against him - Rules of the High Court 1980, O. 18 r. 19(1)(a) - Whether plaintiff disclosed a reasonable cause of action - Allegations of fraud and forgery by plaintiff - Whether if proved would impeach earlier judgments of court - Whether sufficient allegations of fraud against 4th defendant*

This was an appeal by the 4th defendant whose application to strike out the plaintiff's claim against him pursuant to pursuant to O. 18 r. 19(1)(a) of the Rules of the High Court 1980 was dismissed by the Deputy Registrar.

Held:

[1] In an application to strike out pleadings under O. 18 r. 19(1)(a), no evidence shall be admissible and the court must consider only the pleadings for the purpose of determining whether the Statement of Claim disclosed no reasonable cause of action or the defence disclosed no defence. As long as the pleadings disclose some cause of action or raise some question fit to be decided by the judge, the mere fact that the case would be weak and not likely to succeed at trial, would not be a ground for the pleadings to be struck out.

[2] It was obvious that this suit was commenced to impeach the judgment and the various orders made both in the High Court and in the Sessions Court on the grounds of fraud and forgery. The court has no power under any application in the same action to alter and set aside a judgment regularly obtained after it has been entered. However, if a judgment or order has been obtained by fraud and where further evidence which could not possibly be adduced at the original hearing is forthcoming, a fresh action will lie to impeach the original judgment.

[3] There were sufficient allegations of fraud raised against the 4th defendant. The allegations of fraud if proved will clearly impeach the earlier judgments obtained. The plaintiff must be given a right to trial.

[Appeal dismissed.]

Case(s) referred to:
Bank Industri Malaysia Bhd v. Toplace Sdn Bhd & Ors [1997] 3 CLJ 389 ***(aff)***
Dr Ramachandran a/l Sivaguru v. Perwira Habib Bank Malaysia Bhd & Anor [1993] 3 CLJ 635 ***(refd)***
Hock Hua Bank Bhd v. Sahari bin Murid [1981] 1 MLJ 143 ***(refd)***
New Straits Times (M) Bhd v. Kumpulan Kertas Niaga Sdn Bhd & Anor [1985] 2 MLJ 226 ***(foll)***

Legislation referred to:
Rules of the High Court 1980, O. 18 r. 19(1), (1)(a), (b), (c), (d), (2)

For the 4th defendant - Watson Peters; M/s Watson Peters & Mohd Fuad
For the plaintiff - G Rajasingam; M/s Shearn Delamore & Co

Reported by Usha Thiagarajah

JUDGMENT

RK Nathan J:

The Appeal

The 4th defendant sought to strike out the plaintiff's claim against him. The application was made pursuant to O. 18 r. 19(1)(a) of the Rules of the High Court 1980 (the RHC) and was dismissed by the Deputy Registrar. This appeal is against that dismissal.

Facts

At the request of the 1st defendant and her husband (the borrowers) the plaintiff granted two banking facilities:

(a) An overdraft facility of RM252,000 subject to the terms and conditions of an overdraft facility agreement dated 19 October 1990.

(b) A term loan of RM50,000 subject to the terms and conditions of a Term Loan Agreement dated 14 September 1990 (the promissory note).

In consideration of the said overdraft facility the 1st defendant executed a legal charge over a piece of property. The term loan was an unsecured facility. The borrowers breached the terms and conditions of the Overdraft Facility Agreement and the Promissory Note, by failing to pay the sums to the plaintiff. The plaintiff commenced foreclosure proceedings against the borrowers by way of an Originating Summons No. S1-24-206-92 (the OS) for the recovery of the amount due under the overdraft. The plaintiff also filed a summons in the Kuala Lumpur Sessions Court, Summons No. 52-2022-92, for the recovery of the monies due under the term loan.

The public auction of the said property was then fixed for 18 August 1993 at the reserve price of RM380,000. On 16 August 1993 the 3rd defendant acting as the 1st defendant's attorney paid to the plaintiff a sum of RM256,408.49 being part payment of the amount due under the overdraft. The appointment of the 3rd defendant was through a power of attorney dated 20 July 1993. The payment was accepted by the plaintiff on a without prejudice basis. The public auction was then adjourned for the 1st defendant to settle the balance due under the overdraft and the term loan. At all material times the 2nd defendant was acting as the solicitor of the 1st and 3rd defendants.

A dispute then arose. The 3rd defendant refused to pay the amount of the balance demanded by the plaintiff and insisted on only paying the balance due based on his own calculations. It was also the case of the 3rd defendant that the initial payment of RM256,408.49 had settled the principal amount due under the overdraft. This of course was denied by the plaintiff.

In the meantime, the 3rd defendant forwarded to the plaintiff a further sum of RM48,092.40 by way of a cashier's order being payment of the interests due based on his own calculations. The plaintiff refused to accept this and returned the cashier's order to the 2nd defendant's firm.

The 3rd defendant then acting as the 1st defendant's attorney filed an application in the name of the 1st defendant to set aside the order for sale dated 1 December 1992 and also sought damages from the plaintiff. He also counterclaimed for an order to discharge the charge. In respect of the action in the Sessions Court at Kuala Lumpur, the 3rd defendant again acting as the attorney of the 1st defendant applied to set aside the judgment in default dated 4 June 1992.

On 5 October 1993 the High Court set aside the order for sale dated 1 December 1992 with costs and also ordered that the plaintiff do pay damages to the 1st defendant. On 1 September 1994 the 1st defendant also succeeded in her counterclaim and obtained an order to discharge the charge. The plaintiff complied with the orders. In fact on 4 February 1997 the learned Senior Assistant Registrar assessed damages against the plaintiff in the sum of RM250,000. The sessions court also set aside the judgment in default dated 4 June 1992 obtained by the plaintiff against the 1st defendant and her husband. The plaintiff's application for leave to appeal to the Court of Appeal against the order of 1 September 1994 was dismissed by the Court of Appeal on 13 October 1994 as it was of the view that leave need not be obtained for appeals against foreclosure proceedings. The plaintiff applied for a stay of execution of the order of the SAR dated 4 February 1997 pending, (a) the appeal to the judge in chambers against the said order of the learned SAR, and (b) the disposal of these proceedings before me. On 17 March 1997 the

High Court granted an interim order for stay pending the hearing of the substantive stay application.

The plaintiff also applied to the Sessions Court for a stay of execution of its order setting aside the judgment in default. Upon the dismissal of the said application the plaintiff successfully appealed to the High Court which on 17 August 1998 granted a stay of the Sessions Court proceedings pending the disposal of this suit before me.

The Plaintiff's Case (Impeachment Proceedings)

This suit is an attempt *inter alia* to impeach the judgments obtained under the OS and in the Sessions Court and to declare such judgments as null and void and to set them aside.

The basis for the impeachment is the subsequent discovery by the plaintiff that the 3rd defendant was at all material times an undischarged bankrupt and was therefore not entitled to be a lawful attorney of the 1st defendant. The 1st defendant then appointed the 4th defendant, by a power of attorney dated 5 May 1994, as her attorney.

It is the case of the plaintiff that the 1st and 2nd instruments of power of attorney are defective, unlawful, *void ab initio* and by reason thereof cannot be used in any court proceedings and/or in the dealings with the charged property.

Case For The 4th Defendant

The 4th defendant contends that the statement of claim discloses no cause of action against him. It is his case that other than merely stating that the 4th defendant is the donee of the power of attorney there is no averment that he had dealt with the said property. Further it was argued that no particulars of fraud had been pleaded as against the 4th defendant.

The 4th defendant further relied on *res judicata* and further that this action ought to be struck out on grounds of duplicity in that the Sessions Court case filed much earlier, is still pending.

Findings Of The Court

In this case the 4th defendant solely relies on O. 18 r. 19(1)(a) of the RHC. O. 18 r. 19(1) and (2) read as follows:

> 19 Striking out pleadings and indorsements
>
> (1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement, of any writ in the action, or anything in any pleading or in the indorsement, on the ground that –

(a) it discloses no reasonable cause of action or defence, as the case may be; or

(b) it is scandalous, frivolous or vexatious; or

(c) it may prejudice, embarrass or delay the fair trial of the action; or

(d) it is otherwise an abuse of the process of the Court;

and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

(2) No evidence shall be admissible on an application under paragraph (1)(a).

Before I consider the submissions of the parties I must add that when this case came up for hearing of the appeal on 26 August 1998 I had adjourned for written submissions because the respondent/plaintiff had indicated it would take time. Since the court had an open court hearing I had given each party a time frame to submit. After the respondent/plaintiff had replied to the appellant's submission by 24 September 1998 I gave the appellant/4th defendant up to 1 October 1998 to reply, if any, to the respondent's/plaintiff's submission. There has been no reply by that date.

The respondent/plaintiff took a preliminary issue. He argued that I ought not to consider the issue of duplicity of actions since this argument will relate to the appellant relying on sub-r. 1(c).

Whether the question of duplicity of action falls within sub-r. 1(b), (c) or (d) is immaterial so long as it falls outside sub-r. 1(a) and I do so find. Therefore, since the appellant has only relied on sub-r. 1(a) I shall reject the submission of duplicity of actions.

In *New Straits Times (M) Bhd v. Kumpulan Kertas Niaga Sdn Bhd & Anor* [1985] 2 MLJ 226 FC the Federal Court held that in an application to strike out pleadings under O. 18 r. 19(1)(a) no evidence shall be admissible and the court must consider only the pleadings for the purpose of determining whether the statement of claim disclosed no reasonable cause of action or the defence disclosed no defence. Applying the test advocated by the Federal Court it is my finding that on the face of the statement of claim I am not prepared to say that the cause of action pleaded as against the 4th defendant is unsustainable. In fact in *Bank Industri Malaysia Bhd v. Toplace Sdn Bhd & Ors* [1997] 3 CLJ 389 I had held that so long as the pleadings disclose some cause of action or raise some question fit to be decided by the judge, the mere fact that the case would be weak and not likely to succeed at trial, would not be a ground for the pleadings to be struck out.

a It is obvious from a study of the present statement of claim that this suit was commenced to impeach the judgment and the various orders made both in the High Court and in the Sessions Court on the grounds that the said orders were obtained by fraud and forgery. In *Hock Hua Bank Bhd v. Sahari bin Murid* [1981] 1 MLJ 143 FC whilst holding that the court had no power under any b application in the same action to alter and set aside a judgment regularly obtained after it had been entered, the court went on to hold that if a judgment or order has been obtained by fraud and where further evidence which could not possibly have been adduced at the original hearing is forthcoming, a fresh action will lie to impeach the original judgment.

c ***Particulars Of Fraud***

The appellant contends that no particulars of fraud have been alleged against him. I reject this submission. The statement of claim discloses that the 1st defendant and one Sivaloganathan worked together in the same office. The d 1st defendant owed money to the said Sivaloganathan who obtained a judgment for the said sum. The 1st defendant however disappeared from the country. The said Sivaloganathan then approached the 2nd defendant to secure his services to enforce the judgment against the 1st defendant. The said Sivaloganathan then handed his entire file in respect of this case to the 2nd defendant and informed him that the 1st defendant had left Malaysia for India e as she was heavily in debt to many persons. The pleadings disclose that the said 2nd defendant advised the said Sivaloganathan that it would be expedient if the 2nd defendant was allowed to arrange for a power of attorney from India purportedly issued by the 1st defendant, in Sivaloganathan's favour. This was to enable Sivaloganathan to redeem the said property from the plaintiff f and to sell the same for a profit. It was arranged that the profit would then be utilised to set off the amount due to Sivaloganathan and the balance was to be shared equally between Sivaloganathan and the 2nd defendant. This scheme did not materialise as Sivaloganathan refused to partake in it.

g When Sivaloganathan discovered that pursuant to the order of the court dated 1 September 1994 the charge on the said property had been discharged, he issued out a writ of seizure and sale to secure his judgment sum obtained against the 1st defendant. He also lodged a caveat against the said property. The 4th defendant then, acting as the attorney of the 1st defendant, challenged h the proceedings initiated by Sivaloganathan.

Sivaloganathan then went to India to investigate how the said power of attorney was obtained. He went to the address at No. 33 Hunter Road, Ahmadnagar, Maharastra, India, as stated in both the instruments of power of attorney. The 1st defendant could not be located at the said address.

i

In so far as the 1st power of attorney was concerned the said Sivaloganathan met with the notary public Mr. Gorakhsnath N. Kale, who was supposed to have attested the said power of attorney. Mr. Kale informed Sivaloganathan that the serial number for the 1st power of attorney did not correspond with the notary register and accordingly he cancelled his notarial certificate. In any case the 3rd defendant was an undischarged bankrupt at the time the 1st power of attorney was purportedly executed.

It was pleaded that the 2nd power of attorney was not valid and cannot be used because the notary public for the same, Mr. Sivaram S. Nadkarni, was not duly registered as a notary public as required under the laws of India. In fact he could not be located and is believed to be non-existent. The plaintiff has thus pleaded that the signature of the 1st defendant on the 1st and 2nd instruments of power of attorney and on all other documents and affidavits which were purportedly executed by the 1st defendant after the meeting between Sivaloganathan and the 2nd defendant were not that of the 1st defendant. In fact it has also been pleaded that after the charge had been discharged, the said property had been sold to the 5th defendant who is the brother of the 2nd defendant. The 5th defendant denied the purchase, yet the 2nd defendant has moved his legal firm to the said property.

The plaintiff has also averred that the said property had been transferred into the name of the 5th defendant despite Sivaloganathan's caveat over the said property and despite Sivaloganathan's on-going legal proceedings in connection with the said property. The transfer was purportedly obtained through the consent of the 1st and 5th defendants through a consent order dated 16 February 1995 at the Penang High Court by way of Originating Summons No. 24-88-95. The plaintiff has averred that the Penang High Court was not informed of the caveat and the on-going legal proceedings.

I am more than satisfied that there are sufficient allegations of fraud raised against the 4th defendant. The 1st defendant in giving his consent to the High Court at Penang for the sale of the said property to the 5th defendant must have acted through the 4th defendant the donee of the power of attorney. The 4th defendant clearly has a case to answer.

The 4th defendant relied upon the case of *Dr. Ramachandran a/l Sivaguru v. Perwira Habib Bank Malaysia Bhd & Anor* [1993] 3 CLJ 635 where the High Court held that there was no evidence of the allegation of fraud, false misrepresentation or conspiracy against the defendant as contended by the plaintiff and that since all those averments could have been raised in the earlier O. 14 proceedings by the bank against Dr. Ramachandran, to re-open the same

issues by a later impeachment action was an abuse of the powers of the court and to that extent *res judicata* in the wider sense applied, so as to nullify the impeachment proceedings.

Fortunately I have personal knowledge of this case as I acted as counsel for the plaintiff. The plaintiff's appeal to the Federal Court was allowed and the bank's application to strike off was dismissed. The Federal Court in its oral judgment held that there were sufficient grounds of fraud raised to let the case go for trial.

In this case the respondent/plaintiff only became aware of the two improper instruments of power of attorney after the High Court hearing. The allegations of fraud as pleaded if proved will clearly impeach the earlier judgments obtained. The plaintiff must be given the right to trial.

The appeal is therefore dismissed with costs against the 4th defendant.